fore, the principal case seems sound unless the delivery of the note to C makes some substantial difference. If C became a holder in due course, then, to the extent of his interest, the equitable right of the defendant to the note would be cut off, and the defendant's right to the security would in equity pass equally as an incident of the debt.[23] But if C was not such a holder, then the prior rights of the defendant would subsist unimpaired.

It does not appear which alternative meets the facts of the principal case. But either would justify its result, as the part payment of the note to C exceeded the amount for which he held the note as security, leaving the defendant with a right to the balance due thereon. This right he was entitled to protect by retaining the jewels until tender of at least that sum.

INTERSTATE COMPACTS AS A MEANS OF SETTLING DISPUTES BETWEEN STATES. — Three methods have been used in the United States to avoid or determine controversies, potential or existing, between states: (1) Direct legislation by Congress. (2) A suit by one state, either in its political capacity or as *parens patriæ*,[1] against the other state, in the United States Supreme Court. (3) A compact between states approved, when necessary, by Congress.

The first of the methods is narrow in scope, because Congress may interfere between states only when its constitutional powers permit it to do so.[2] Congress has full power over the territories, however, and by fixing their boundaries [3] and jurisdictional limits before they became states,[4] has doubtless anticipated much interstate dissension.

The second method is more inclusive. Whatever doubt there may be as to what constitutes an interstate cause of action, it is undisputed that the Constitution [5] gave states a remedy for recognized legal wrongs.[6]

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[23] Kernohan *v.* Manss, *supra*, note 18.

[1] Missouri *v.* Illinois and Sanitary District, 180 U. S. 208 (1901); Kansas *v.* Colorado, 185 U. S. 125 (1902); New York *v.* New Jersey and Sewerage Commissioners, U. S. Sup. Ct., Oct. Term, 1920, No. 2, Original. *Cf.* Georgia *v.* Tennessee Copper Co., 206 U. S. 230 (1907).

[2] Legislation as to navigable interstate waters is the instance most in point. See Escanaba Co. *v.* Chicago, 107 U. S. 678, 682 (1882); United States *v.* Rio Grande Irrigation Co., 174 U. S. 690, 708 (1899).

[3] See, as instances, 33 STAT. AT L. 714 (consent to Arkansas to extend her western boundary at the expense of a territory); 26 STAT. AT L. 971, 36 STAT. AT L. 1454 (confirming and reaffirming the boundary line between the state of Texas and the territory of New Mexico). See George C. Lay, "Interstate Controversies," 54 AM. L. REV. 705, 710.

[4] Boundaries and jurisdictional limits are laid down in the enabling acts. It is common in such acts to give states concurrent jurisdiction over boundary waters. State *v.* Moyers, 155 Iowa 678, 136 N. W. 896 (1912); State *v.* George, 60 Minn. 503, 63 N. W. 100 (1895); Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111 (1903).

[5] Art. III, § 2, cl. 1.

[6] In colonial days, disputes between the colonies were settled by the Privy Council. See Penn *v.* Lord Baltimore, 1 Ves. 443 (1750). See 2 STORY, COMMENTARIES ON THE CONSTITUTION, 5 ed., §§ 1679, 1681. Under the Articles of Confederation, Art. IX, there was a provision for the appointment of commissions, with an appeal to Congress,

There was hesitation at first, during the framing of the Constitution, as to whether Congress, or the Supreme Court, or both, should be the tribunal to determine such questions.[7] When the Supreme Court was finally fixed upon, the provision was warmly supported,[8] and the court's original jurisdiction over interstate suits of a civil nature was by statute [9] made exclusive. This function of the court has justly become one of the most admired features of the American federal system.[10] By this means over seventy suits between states have been decided.[11] But this method of determining interstate disputes, necessary though it is,[12] is not entirely adequate. It is difficult to secure execution of a judgment against a state.[13] This difficulty, however, is inherent in any method of determining interstate differences, and can be overcome by borrowing

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but of eight proceedings commenced under this procedure, only three cases were actually heard, and only one was finally settled. Eleven interstate disputes survived the Confederation. See Fowler *v.* Lindsey, 3 Dall. (U. S.) 411 (1799); Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657 (1838). See PUTNEY, CONSTITUTIONAL LAW, § 62; William C. Coleman, "The State as a Defendant," 31 HARV. L. REV. 210, 211; Carman F. Randolph, "Notes on Suits Between States," 2 COL. L. REV. 283.

[7] For the history of this provision in the Constitutional Convention, see Missouri *v.* Illinois, *supra*, at 219–224; William C. Coleman, *supra*, 31 HARV. L. REV. 210, 211–216.

[8] See Hamilton in THE FEDERALIST, No. 80. Some such method must be available, since neither war nor diplomatic means is open to the states.

[9] See 1789 1 STAT AT L. 80.

[10] In Switzerland the Federal Tribunal has jurisdiction over suits between cantons. See DICEY, CONSTITUTION, 7 ed., 522. The High Court of Australia has jurisdiction over suits between states, and perhaps a wider range of disputes is made justiciable. See 1900 COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT, 63 & 64 VICT., c. 12, §§ 75 (iv.), 78; A. I. CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW, 1 ed., 110; W. H. MOORE, COMMONWEALTH OF AUSTRALIA, 1 ed., 267–269.

[11] Most of these are boundary disputes. Others concern extradition, state obligations, riparian rights in interstate rivers and jurisdiction over interstate oyster beds, and public health. The cases are collected in JAMES B. SCOTT, JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES OF THE AMERICAN UNION, and are fully annotated in a separate ANALYSIS. See an instructive review of this work by George C. Lay, "Interstate Controversies," 54 AM. L. REV. 705. The cases are listed in the Contents to Mr. Scott's ANALYSIS. To this list should be added Arkansas *v.* Mississippi, 250 U. S. 39 (1919); U. S. Sup. Ct., Oct. Term, 1920, No. 6, Original; Minnesota *v.* Wisconsin, 252 U. S. 273 (1920); Oklahoma *v.* Texas, U. S. Sup. Ct., Oct. Term, 1920, No. 23, Original; New York *v.* New Jersey and Passaic Valley Sewerage Commissioners, U. S. Sup. Ct., Oct. Term, 1920, No. 2, Original.

[12] It is necessary where states cannot come to an agreement, where congressional assent to an agreement is refused, or where a state disputes the terms of an agreement it has made or refuses to perform it. See Virginia *v.* West Virginia, 206 U. S. 290 (1907).

[13] Georgia refused to obey the judgment in Chisholm *v.* Georgia, 2 Dall. (U. S.) 419 (1793), and made it a capital offense for anyone to undertake to execute it. The potential complications may be appreciated from a consideration of the final phase of Virginia *v.* West Virginia, 246 U. S. 565 (1918).

Apparently a plaintiff state may be authorized to take possession of disputed territory; a defendant state may be ordered to cease doing acts within the state, Missouri *v.* Illinois, *supra;* Kansas *v.* Colorado, 185 U. S. 125 (1902); and performance of acts by subordinate officials may be compelled by *mandamus*, or contempt proceedings. Money judgments have also been rendered, but until recently the difficulties involved were not considered. See United States *v.* North Carolina, 136 U. S. 211 (1890). One difficulty is that all the state's property may be devoted to governmental purposes, and the only way of satisfying the judgment will be by appropriation of the state legislature. See George C. Lay, *supra*, 54 AM. L. REV. 705, 714; Carman F. Randolph, *supra*, 2 COL. L. REV. 283, 309.

assistance from the executive [14] or from Congress.[15] Again, though some doubt has been felt as to what law will govern,[16] precedents are gradually being established. But the chief and seemingly insurmountable difficulty is that not all matters in dispute between states are considered as capable of judicial determination.[17] Thus a state cannot be compelled to perform an obligation which, if in question between two nations, could be enforced only through the political departments.[18] So also where the injury to a state is one of which the law usually takes no cognizance, the Supreme Court will give no relief.[19]

In view of these defects, agreements between states upon points likely to cause friction are desirable. But there are constitutional difficulties to be overcome. The Constitution forbids absolutely all "treaties, alliances or confederations," and any "agreement or compact with another State," without the consent of Congress.[20] These provisions seemed so naturally desirable [21] to the framers that they called forth little comment, either in the Convention debates or in the Federalist essays.[22] Parallel provisions in the Swiss Constitution [23] distinguish between political agreements, which are prohibited absolutely, and non-political agreements, which, with federal consent, are permitted.[24]

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[14] But compare Jackson's attitude after Worcester *v.* Georgia, 6 Pet. (U. S.) 515 (1832). See William C. Coleman, *supra*, 31 HARV. L. REV. 210, 228.

[15] In Virginia *v.* West Virginia, *supra*, the Supreme Court held it had power to issue a *mandamus* to compel West Virginia to pay its debt; but refused to exercise that power until Congress was first allowed a chance to coerce West Virginia by legislation. West Virginia arranged for payment without further urging. See JAMES B. SCOTT, *op. cit.*, ANALYSIS, 519.

[16] See Rhode Island *v.* Massachusetts, *supra*, note 6; South Carolina *v.* Georgia, 93 U. S. 4 (1876); Missouri *v.* Illinois, 200 U. S. 496 (1906). See also 19 HARV. L. REV. 606; 21 HARV. L. REV. 132.

[17] There must of course be a real dispute between the states. Rights of a citizen or a group of citizens masquerading as states' rights will not be adjudicated. New Hampshire *v.* Louisiana, 108 U. S. 76 (1883); South Dakota *v.* North Carolina, 192 U. S. 286 (1904). But see Carman F. Randolph, *supra*, 2 COL. L. REV. 283, 292.

[18] In Kentucky *v.* Dennison, 24 How. (U. S.) 66 (1860), the court refused to order a state governor to perform his constitutional duty to return a fugitive. See Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614 (1840); Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 288, 289 (1888); South Carolina *v.* Georgia, 93 U. S. 4 (1876); PATTERSON, UNITED STATES AND THE STATES UNDER THE CONSTITUTION, 2 ed., § 96. Compare the broad conception of Hamilton as to the probable scope of the Supreme Court's jurisdiction. THE FEDERALIST, No. 80. And compare the powers given to the High Court of Australia, note 10, *supra*.

[19] See Louisiana *v.* Texas, 176 U. S. 1 (1900); Kansas *v.* Colorado, 206 U. S. 46 (1907).

[20] Art. I, § 10, cl. 1 and 3.

[21] See Marshall, C. J., in Barron *v.* Baltimore, 7 Pet. (U. S.) 243, 248 (1833); 1 BRYCE, AMERICAN COMMONWEALTH, 2 ed., 375. The "confederation" clause was of course one decisive reason against the legality of the Southern Confederacy. See PATTERSON, *op. cit.*, § 85.

[22] See Madison in THE FEDERALIST, No. 44.

[23] Art. 7.

[24] The Swiss cantons had been truly sovereign states, and had even been in the habit of negotiating independently with foreign countries. But after the *Sonderbund* of 1847, the cantons were willing to resign their rights, to prevent the recurrence of such a menacing confederation. See W. A. B. Coolidge, "Switzerland; History," ENCYCLOPÆDIA BRITANNICA, 11 ed.; DICEY, *op. cit.*, 527. In America, although the states were jealous of each other and of the federal power, and although no such

The United States Constitution makes no such explicit distinction.[25] But it does recognize different degrees of prohibitions. Thus treaties, alliances, or confederations are absolutely prohibited.[26] On the other hand, though in no case is Congressional assent expressly dispensed with,[27] state decisions and unchallenged federal *dicta* do sanction compacts unapproved by Congress if the political condition of no state is affected thereby.[28] Intermediate are those compacts where the assent of Congress is required. This assent may be permissive or ratifying, express or implied.[29] The adoption by Congress of proceedings taken under the compact is the typical instance of implied ratification.[30] Both permission and ratification are combined in a recent federal statute,[31] which approves an agreement between Minnesota and South Dakota as to criminal jurisdiction over boundary waters, and consents in advance to a similar compact between the states of North and South Dakota, Minnesota, Wisconsin, Iowa, and Nebraska. Such a statute is to be commended. Compacts between states, approved by Congress, offer a solution to interstate disputes hitherto considered unapproach-

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impelling historical example was before them, yet they had never been truly sovereign as colonies, and it is not surprising that they made little objection to this limitation on their powers. Indeed, it would have been surprising if they had permitted states by compacts to enlarge their powers at the expense of the rest of the states. See 1 STORY, *op. cit.*, § 244; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed., 8.

[25] The Articles of Confederation had distinguished dealings with foreign nations (absolutely prohibited) and with other states (permissible with the assent of Congress). Art. VI. See 2 STORY, *op. cit.*, § 1402.

[26] The framers were familiar with the New England Confederacy of 1643, the Temporary Congress of 1690, and the Plan of Union of 1754, and especially, of course, with the successful united action of the colonies against Great Britain in fighting the Revolution. See COOLEY, *op. cit.*, 7 ed., 7; EGERTON, FEDERATIONS AND UNIONS WITHIN THE BRITISH EMPIRE, 8, 14.

[27] Since the Constitution forbids "treaties, alliances or confederations" between states at all times, and then goes on to refer to "agreement or compact," Story concluded that the latter words must have been used in a very broad sense to include any sort of arrangement between states, even as to local administrative matters, and that no agreement would ever be good without Congressional consent. See 2 STORY, *op. cit.*, § 1403; Andrew A. Bruce, "Compacts and Agreements of States," 2 MINN. L. REV. 500, 514.

[28] Mackay *v.* R. R. Co., 82 Conn. 73, 72 Atl. 583 (1909); Hendricks *v.* Commonwealth, 75 Va. 934 (1882). See Virginia *v.* Tennessee, 148 U. S. 503, 518 (1893); Wharton *v.* Wise, 153 U. S. 155, 167–170 (1893). See Andrew A. Bruce, *supra*, 2 MINN. L. REV. 500. Chief Justice Bruce approves the distinction but suggests that non-political compacts are voidable by Congress. See also 1 WILLOUGHBY, CONSTITUTIONAL LAW, § 112; PUTNEY, *op. cit.*, § 101.

[29] Poole *v.* Fleeger, 11 Pet. (U. S.) 185 (1837); Central R. R. Co. *v.* Jersey City, 209 U. S. 473 (1908).

[30] See State *v.* Cunningham, 102 Miss. 237, 59 So. 76 (1912); Russell *v.* American Ass'n, 139 Tenn. 124, 201 S. W. 151 (1918). Approval may be inferred from admission as a state under the terms of a compact. Green *v.* Biddle, 8 Wheat. (U. S.) 1 (1823); Virginia *v.* West Virginia, 11 Wall. (U. S.) 39 (1870). See 2 STORY, *op. cit.*, § 1405.

[31] Resolution of Mar. 4, 1921, No. 68. See 1921 FED. STAT. ANN., Nos. 26–27, p. 67. Seventeen statutes have been passed confirming existing compacts between states; seven approving in advance prospective compacts. The statute most closely resembling that under discussion is 36 STAT. AT L. 882, by which approval was given to a prospective agreement by Wisconsin, Illinois, Indiana, and Michigan as to their criminal jurisdiction on Lake Michigan. See the statutes listed by Andrew A. Bruce *supra*, 2 MINN. L. REV. 500.

able,[32] and afford a remedy less troublesome to the court [33] and more satisfactory to the parties [34] than recourse to the Supreme Court.

TAXATION OF THE EXERCISE OF TESTAMENTARY POWERS OF APPOINTMENT. — An increasing amount of litigation is demonstrating the importance of determining when a state may tax the execution of testamentary powers of appointment. According to accepted theories of what constitutes due process, such a tax will be unconstitutional unless the state by its law contributes as a *quid pro quo* some benefit or privilege toward accomplishing the succession.[1] It seems clear that the state wherein the property, either real or personal, is located may always impose such a tax, for its law actually permits the appointee to take. In the case of personalty, wherever it may be, the state of the donor [2] likewise has an unfailing ground for taxation in that its law will determine the validity

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[32] Questions as to expropriation of lands in another state, impossible by ordinary eminent domain proceedings, might be settled by this means. See Charles N. Gregory, "Expropriation by International Arbitration," 21 HARV. L. REV. 23; Carman F. Randolph, *supra*, 2 COL. L. REV. 364, 378. *Cf.* Virginia *v.* Tennessee, 148 U. S. 503, 518 (1893). So as to the question of how much water a state may divert from an interstate river, raised by Kansas *v.* Colorado, 185 U. S. 125 (1902); 206 U. S. 46 (1907). See a similar situation discussed in George B. French and Jeremiah Smith, "Power of a State to Divert an Interstate River," 8 HARV. L. REV. 138.

[33] The Supreme Court urges that interstate compacts be employed as far as possible. See Washington *v.* Oregon, 214 U. S. 205, 217, 218 (1909); Minnesota *v.* Wisconsin, 252 U. S. 273, 283 (1920).

[34] Litigation between states is often protracted, and by a compact the expense and delay of a lawsuit may be avoided, but the difficulty of enforcement still remains. There is no reason to suppose at the present time that a state would be any more ready to heed the terms of its own compact than the decree of the United States Supreme Court.

[1] The general principles governing a state's right to tax, as distinguished from its power to do so, under the 14th Amendment, were well defined by the Supreme Court in Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194, 202 (1905). *Cf.* Matter of Cummings, 63 N. Y. Misc. 621, 118 N. Y. Supp. 684 (1909); State *v.* Brim., 4 Jones Eq. (N. C.) 300 (1858). See C. E. Carpenter, "Jurisdiction over Debts," 31 HARV. L. REV. 905, 919 *et seq.*

[2] It is well settled that the state of domicil may tax the succession to a resident's foreign personalty. Matter of Swift, 137 N. Y. 77, 32 N. E. 1096 (1893); Frothingham *v.* Shaw, 175 Mass. 59, 55 N. E. 623 (1899). Whether there is actual jurisdiction for such a tax is open to question. See C. E. Carpenter, *supra*, at 921. The fact that the rules of succession furnished by the state of the testator do in reality fix the rights of the beneficiaries may be sufficient. Dammert *v.* Osborn, 141 N. Y. 564, 35 N. E. 1088 (1894). See J. H. Beale, "Jurisdiction to Tax," 32 HARV. L. REV. 587, 629. If so, then the same reasoning should justify an inheritance tax by the state of the donor, to be collected at the execution of the power by will. But where the state in which chattels subject to appointment are found provides by statute that tangible property of a foreign decedent shall pass according to domestic law, another state could not tax on the basis of residence of the donor. See 1874 ILL. REV. Stat., c. 39, § 1. When the donor is a resident, but the donee and the appointed property both foreign, the state of the donor, though competent to tax the transfer, would not do so under a statute like that of New York, *infra*, n. 9, which includes only such appointments as would be taxable if the property belonged absolutely to the donee. *Cf.* Matter of Fearing, 200 N. Y. 340, 93 N. E. 956 (1911). If, however, any of the property is within the state, the transfer falls to that extent under the statute. Matter of Kissel, 65 Misc. 443, 121 N. Y. Supp. 1088 (1909).